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No. 91-1284

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 111

Petitioner,

v.

COLORADO-UTE ELECTRIC ASSOCIATION, INC., and NATIONAL LABOR RELATIONS BOARD,

Respondents.

RESPONDENT COLORADO-UTE ELECTRIC ASSOCIATION'S BRIEF IN OPPOSITION

Gerard C. Smetana
RICHMAN, LAWERNCE, MANN GREENE & SMETANA
333 West Wacker Drive
Chicago, IL 60606
(312) 855-0300

James H. Delman
Colorado-Ute Elec. Assn.
1845 South Townsend St.
Montrose, CO 81401
(303) 249-4501

Michael E. Avakian
(Counsel of Record)
CENTER ON NATIONAL LABOR POLICY, INC.
5211 Port Royal Rd., Ste. 103
Springfield, VA 22151
(703) 321-9180

QUESTION PRESENTED

Whether the court below correctly held that when the National Labor Relations Board finds a collective bargaining impasse over the terms and conditions of an employer's merit pay proposal has occurred, an employer does not commit an unfair labor practice when it subsequently implements that merit pay proposal.

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COLORADO-UTE ELECTRIC ASSOCIATION, INC., and NATIONAL LABOR RELATIONS BOARD,

Respondents.

BRIEF OF RESPONDENT COLORADO-UTE ELECTRIC ASSOCIATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Respondent, Colorado-Ute Electric Association, Inc. ("Colorado-Ute"), respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Tenth Circuit's decision in this case.

COUNTERSTATEMENT OF THE CASE

The facts here are essentially uncontested.[1] The Appellate Court's recitation is correct.

However, there exist two significant discrepancies in the Petitioner's presentation that requires clarification. The first involves the extent of bargaining for the employer's merit pay proposal. The second, involves whether Respondent engaged in any direct dealing with employees, a question found in the negative by the Board.

1. The collective-bargaining agreement relative to this proceeding was effective from September 11, 1983 to September 13, 1986. Vol. II, Jt. Ex. 1. Article 32 of the agreement provided a wage reopener clause allowing either party to "elect to negotiate wages" during the contract's term. That agreement also provided wage scale increases based upon tenure alone rather than performance. On June 8, 1984, the union gave Colorado-Ute notice that it wished to renegotiate wages.

Beginning on July 31, 1984, the parties embarked on a total of twenty-three (23) bargaining sessions. Eight sessions involved a federal mediator. Beginning with the very first session, Colorado-Ute announced that it "was under pressure from other businesses in the community because Respondent's wage rates were higher than the rates which prevailed in the area." Pet. 52a Colorado-Ute also explained to the union that across the board increases did not reward those employees at the top of the wage scales and actually provided them with smaller increases. Pet. 53a n.7. Colorado-Ute also wanted to reward superior employee performance, which the wage scales did not provide. Pet. 81a. The union proposed a nine (9) percent across the board increase.

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[1]Respondent Colorado-Ute Electric Association, Inc. is presently a debtor in bankruptcy. *See In re Colorado-Ute Electric Assn.*, 120 Bankr. 164 (Bankr. D. CO. 1990). Liquidation of the bankrupt estate has yet to occur.

In response to concerns expressed by the union, Colorado-Ute agreed to retain the progression steps over concern by the union that there would be no other wage guarantees, Vol. I at 228, ll. 20-25. Thereafter, merit raises proposed by Colorado-Ute were to be made within the limited range of seven progression steps that Colorado-Ute proposed to retain. 52a; Vol II, Jt. Ex. 11. The first tier of the two tier wage structure Colorado-Ute proposed included "step increases" for each job classification with the first rate increase after six months, advancing early to the seventh rate step in the "6th year," and continued advancement through the steps based on time in grade. Jt. Ex. 11. There is no dispute that the minimum wage steps in the contract were subject to the grievance and arbitration procedures. Pet. 24a; Vol I. at 75, ll.5-20.

The second-tier of the wage proposal was the merit increase program. Here "individual performance and contribution on the job" were the applicable criteria. The amount and timing of merit pay to be determined by the division head and the president. Jt. Ex. 11. Colorado-Ute also reacted to concerns about favoritism and proposed that the company president decide merit increases, Vol. I at 229, ll. 10-25. Colorado-Ute included standards for merit increases: "individual performance and contribution on the job." Jt. Ex. 11.

Through the next nine bargaining sessions, Colorado-Ute modified its initial merit wage proposal and adopted some modifications recommended by the union.[2] At the tenth bargain-

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[2]For example, Colorado-Ute initially proposed that its merit increases come from the recommendations of supervisors. At the fourth bargaining session, the union noted that employees would be wary of filing grievances if they thought it would jeopardize their merit increases. Pet. 55a. In that session, Colorado-Ute "abandoned its stand on the elimination of the progression steps and incorporated them in toto as the bottom tier for each successive wage proposal submitted to the union during the negotiations." Pet. 81a. At the sixth session, Colorado-Ute revised its original merit raise plan and proposed to have merit reviews determined by department heads with an appeal to the company president. Pet. 66a-57a.

ing session on September 5, 1984, Colorado-Ute submitted its "Final Company Offer" which maintained the current progression steps for each job classification and set forth a merit increase program with the amount and frequency to be determined by the appropriate department head considering an employee's performance. Colorado-Ute also informed the union that it "reserve[d] the right to 'impasse' its proposal." Pet. 60a. The union counter-offered with a four percent across the board increase.[3]

On September 12, 1984, Colorado-Ute notified the union that it considered the parties to be at impasse regarding the wage negotiations and that on September 23 it would implement its final wage proposal. Pet. 61a. On September 18, the union began picketing petitioner's facilities. The strike ended on October 8, 1984. Vol I at 79, ll 1-2.

At the bargaining session of October 3, 1984, Colorado-Ute provided the union the results of its first merit wage review. 63a n.11.[4] The union never requested to bargain over the individual merit increases and, in fact, declined some offers to participate. In Joint Exhibit 50, the union's negotiating notes on October 3, 1984, show Colorado-Ute offered to discuss merit increases at labor-management meetings. On November 6, Respondent suggested that the business agent attend meetings with the President and Division Heads of Colorado-Ute which determined the merit increases. Vol. I at 329, ll. 1-8, but the union declined. Vol. I at 329, ll. 9-11.

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[3]At the twenty-third (23) session, Colorado-Ute agreed to permit employee appeals of their merit award to the company president to be presented with a union representative present. Pet. 24a; 71a.

[4]Contrary to the statement made by Petitioner at p.4, Colorado-Ute did not "grant" merit increases on September 23, 1984, but began the pay period for merit wages. Pet. 63a. Monetary payments did not reach unit employees until payday October 5, 1984.

2. The second error in the Petition is the impression that the employer "met personally with employees, without the union, to discuss dissatisfaction with merit increases." Pet. at 5. This is incorrect. The union's own steward invited Respondent's president to speak to unit employees. That steward, Joan Hiss, requested management to outline how the merit pay plan would work. 71a. Subsequently, Joan Hiss expressed dissatisfaction with her own merit pay raise. She presented her objection to Respondent's president who told Hiss to await her next step increase. 72a. The Board found that Colorado-Ute did not attempt to bargain individually in these circumstances and that the union's steward's "complaint regarding her wage increase as an employee cannot be divorced from her representative status as the union steward. Thus, Hiss the union steward was in fact representing Hiss the employee." Pet. 84a.

3. Under these circumstances, the ALJ concluded that Colorado-Ute had not engaged in bad-faith or surface bargaining. He found that the Colorado-Ute had bargained hard for the two-tier wage structure, a "legitimately held position during the wage-reopener negotiations." Pet. 80a. Moreover, the ALJ found that incorporation of the bottom tier of guaranteed rate increases of 3.5% into the wage proposal, also reflected good faith. Pet. 80a.

Finding a "genuine impasse," Pet. 85a, the ALJ held that Colorado-Ute was "free to unilaterally implement changes in employment terms and conditions; provided those changes are reasonably consistent with the terms last offered to the Union during negotiations." Pet. 85a. He also ruled "the amount and frequency" as well as "the number of times" Colorado-Ute could give merit reviews to the employees were within its discretion: "Thus, no limitations were contained in Respondent's wage proposal regarding the number of times an employee could receive a merit review or the percentage of wage increase that could be granted." Pet. 89a.

The Board agreed with the ALJ's determinations that the parties had reached impasse on September 12, 1984, that Colorado-Ute had not engaged in bad faith or surface bargaining, and

even that Colorado-Ute "was free to consider employees for merit increases and to base its consideration on the criteria mentioned above, for neither of these aspects of its proposal involved the waiver of a statutory right." Pet. 37a-38a. The Board agreed that merit increases were a mandatory subject of bargaining and "if the parties reach good-faith impasse in negotiations, the employer generally does not violate Section 8(a)(5) by thereafter implementing changes consistent with those proposed to the union." Pet. 36a. "The employer's duty to bargain does not give the union the right to veto the proposed changes by withholding consent." Pet. 36a-37a.

However, the Board decided that the increases themselves, apart from the program, were tantamount to "wages" under section 8(d) of the Act and therefore the actual granting of merit increases under the program may involve substantial discretion...the bargaining agent is entitled to be consulted." Pet. 34a. The Tenth Circuit denied the Board's request to enforce that ruling. It held the Board was wrongfully attempting to protect the union's right to bargain by regulating substantive contract terms at the expense of the employer. Pet. 28a.

SUMMARY OF ARGUMENT

The court below reaffirmed the line demarcating federal interference with the collective bargaining process set by this Court in *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952). There, this Court reaffirmed that mandatory subjects of bargaining and terms within collective bargaining agreements are matters outside the Board's supervisory jurisdiction.

The Tenth Circuit ruled that upon a good faith impasse over a mandatory issue of collective bargaining, an employer is free to attempt to impose its last offer. The Petitioner's attempt to show that an employer's implementation of merit pay at impasse "waives" an inchoate union right to bargain rather than a union obligation to statutorily "meet and confer" with the employer on

mandatory subjects, is novel.[5] Furthermore, this argument fails to comport with unanimous legal precedent in the circuits and is actually an attempt to obtain under auspices of the Act contract benefits Petitioner could not win for itself at the bargaining table. For these reasons, no substantive rule of law is presented warranting review at this time.

THE WRIT SHOULD BE DENIED

I. The Decision Below Raises No Issues Worthy of Review

The Petitioner alleges that the decision below conflicts with decisions of this Court. Although the matter represents an important issue in the law, the decision of the Tenth Circuit plainly considered and relied upon this Court's decisions in *NLRB v. Katz*, 369 U.S. 736 (1962); *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952), and *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). Careful review of the appellate court's decision creates or sustains no conflict in the circuits or in any other federal court.

As the Tenth Circuit recognized, the Board's position in this case was one of first impression and was made without reliance upon any legal authority. It was Congress' purpose in requiring collective bargaining not to authorize the Board to implement or remake any contract provision of either party not won at the bargaining table, but to provide a forum where disagreements could be peacefully settled, and if not, to permit either party to resort to economic weapons at its disposal to achieve its objectives. *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 402-04 (1952).

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[5]Section 8(d), 29 U.S.C. § 158(d), establishes that the statutory representative has only a *duty* to meet and confer with the employer to reach an agreement. It provides:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment....

Furthermore, Congress required bargaining only over wages or terms and conditions of employment. 29 U.S.C. § 8(d). Subjects covering these areas are mandatory subjects of bargaining that may be insisted upon to impasse. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). If agreement between labor and management cannot be reached on particular mandatory subjects of bargaining, then an employer has always been free to implement its last offer in order to carry on its business. *See NLRB v. Katz*, 369 U.S. 736, 745 (1962)[6]; *Newspaper Printing Corp. v. NLRB.*, 625 F.2d 956. 966 (10th Cir. 1980).

However, the Board found that because "the actual granting of merit increases under the program may involve substantial discretion," the union must be consulted in "determining the amounts and timing of the increases." Pet. 34a. This conclusion can only be true where the employer agreed to give the union that right in its proposal. When the union makes no proposal to limit the employer's discretion over timing and amounts, how can it be said that the employer either failed or refused to bargain over them? "Certainly, the Board lacks the power to compel concessions as to the substantive terms of a labor agreement." *American Nat'l Ins. Co.*, 343 U.S. at 833. Neither can the Board through its remedial power seek to set aside employment terms:

> While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based-private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.

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[6]In *Katz*, the Court distinguished the situation where the employer implemented a different economic package at impasse: "Of course, there is no resemblance between this situation and one wherein an employer, after notice and consultation, 'unilaterally' institutes a wage increase identical with one which the union has rejected as too low." *Katz*, 369 U.S. at 745 n. 12.

H.K. Porter Co. v. NLRB, 397 U.S. 99, 107-08 (1970).

The Court in *H.K. Porter*, clearly demonstrated that the Congress believed that the balance of economic harm provided for in the Act would encourage mutual bargaining. If the elements of an employer's final offer and economic devices can be upset by the Board, Congress' carefully constructed policy would be destabilized because workers always retain the economic means to apply pressure through the right to strike over any disagreement with management's proposed terms, as it did here. The Board cannot interfere in this process by either taking statutory embedded employee rights away or repositioning the fulcrum to the detriment of employers.

The circuit courts are not in disagreement on this issue. In *Struther Wells Corp. v. NLRB*, 721 F.2d 465 (3d Cir. 1983), *enf. denied*, 262 N.L.R.B. 1080 (1982), the Third Circuit denied enforcement of a Board decision that the company could not insist on merit pay in management's "sole discretion." As in the case at bar, the Board had held that for the union to agree to the merit wage provision would cause a waiver of its right of representation that the employer could not insist to impasse upon. Therefore, the employer's alleged bad-faith attempt to negotiate that merit pay prevented a valid impasse. The Third Circuit disagreed:

> In *American Nat'l*, the Supreme Court held that an employer does not commit a per se unfair labor practice by bargaining for a management functions clause that gives management exclusive control over matters that otherwise would be subject to the duty to bargain. 343 U.S. at 409, 72 S.Ct. at 832. Similarly, the company here did not violate the Act by insisting on a clause by which it would maintain exclusive control over merit increases....
>
> It appears that the Board, by finding bad faith in these proposals, is doing exactly what it may

> not do. The Supreme Court has stated that "the Board may not, either *directly or indirectly*, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreement." *American Nat'l*, 343 U.S. at 404, 72 S.Ct. at 829. The Court has further stated that § 8(d) was meant to prevent the Board from controlling the settling of the terms of collective bargaining agreements.

721 F.2d at 470 (emphasis added).

Similarly, in *NLRB v. Tomco Comm.*, Inc., 567 F.2d 871, 883 (9th Cir. 1978), the Ninth Circuit rejected the Board's theory that a management rights clause granting management exclusive authority over such terms of employment as wage rates, incentives and bonus compensation were 'proposals clearly designed to force the Union into abandoning its *statutory rights and duties*.'" 567 F.2d at 878 (emphasis in original).

> If the point is that the Union has a *duty* of representation to its members, which forbids it to concede certain prerogatives to management, and correspondingly forbids management to insist upon these prerogatives, we find the doctrine novel. The Board cites no statutory or case law in its support.

Id. at 878-79.

The Tenth Circuit followed the decisions of its sister Circuits construing *American Nat'l Ins.*, that "similarly rejects the Board's position that instituting discretionary wage terms necessarily abrogates, or even diminishes, a union's right to bargain. To the contrary, by vigorously bargaining over how a discretionary wage clause would be implemented, an employer *vindicates* the union's right to bargain." Pet. 23a. The Board's attempt to "indirectly" control the employer's right to preserve its economic position at

impasse eviscerates the employer's bargaining rights. Pet. 26a.[7] In all respects, the Petitioner's argument conflicts with this Court's intent and must be rejected.

The fact that implementation of a merit pay proposal does not constitute a waiver of union rights was previously the Board's long-standing position. *Southern Wipers, Inc.*, 192 N.L.R.B. 816 (1971). There, the reservation by management of merit increases was also argued to be a waiver of the union's right to bargain and upon impasse, that merit raises could not be granted. The Board held this argument was unpersuasive not because the employer was refusing to bargain over wages, but because the employer was refusing to give in to the union's position and it was not required to. Moreover, as here, the employer "provided the Union with advanced notice of its intent to grant merit increases before it did so." 192 N.L.R.B. at 822. *Also Chevron Chemical Co.*, 261 N.L.R.B. 44, 110 L.R.R.M. 1005 (1982) (finding no violation when employer implemented merit wage increases).[8]

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[7]The Petitioner's suggestion that *NLRB v. J.H. Allison & Co.*, 165 F.2d 766, 768 (6th Cir. 1948) and *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1189 (D.C. Cir. 1981), conflict with the Tenth Circuit's ruling is out of context and incorrect. *J.H. Allison* was a case where the employer completely refused to bargain over the subject of merit raises and refused to provide the union with information concerning individual raises to unit employees in the mistaken belief that "merit raises are not proper subject matter for collective bargaining." 165 F.2d at 767. In *Blevins*, a contempt case, the D.C. Circuit explained that the employer's merit pay proposal was in fact executable "so long as it is willing to confer with the union if the wages are questioned. In other words, it need not bargain *before* it grants the raise." 659 F.2d at 1189 n.98 (emphasis in original). Clearly, both cases are distinguishable from the instant case, for Colorado-Ute bargained to impasse on merit pay and the record demonstrates the union never sought to question the raises actually granted to the bargaining unit.

[8]Petitioner suggests that *Local Union No. 47, IBEW v. NLRB*, 927 F.2d 635 (D.C. Cir. 1991), cited at pp. 8-9 is indistinguishable to its favor. There, the employer also imposed its wage scale after impasse during contract reopener negotiations. The Board and the circuit court found a valid impasse had been reached and that the employer's action implementing across-the-board raises was proper economic leverage under the extant union contract. *Id.* at 644. Similarly,

Having deviated from its long-standing interpretation of the Act, the burden was on the Board and Petitioner to explain why the creation of a new union right is a feasible interpretation of the Act when other courts have not accepted any such extreme limitation on management's right to continue its business at impasse. *See NLRB v. Sands Mfg. Co.*, 306 U.S. 332, 343 (1939). Colorado-Ute never requested that the union waive its statutory right to bargain over wages. In fact, Colorado-Ute was bargaining with the union only over wages at the time; the single item covered by the reopener clause. Colorado-Ute bargained vigorously over the wage proposal and did not seek the right to bargain individually with employees. The union, as vigorously, refused to consider Colorado-Ute's plan.

Although the Petition incorrectly identifies a circuit conflict as necessitating review, it is clear that the Board's decision affects all employers nationwide and has ignited a troublesome issue central to the administration of the Act. Because the Board is continuing to interpret the Act in spite of the Tenth Circuit's adverse ruling, *see McClatchey Newspapers, Inc. v. NLRB*, 299 N.L.R.B. No. 156 (1990), pet. docketed 90-1602 (Argued Feb. 3, 1992), the Court may properly grant certiorari to affirm.

II. IT IS NOT A PER SE VIOLATION OF THE NLRA FOR MANAGEMENT TO BARGAIN AND IMPLEMENT AT IMPASSE THE MANDATORY SUBJECT OF MERIT RAISES EVEN IF CONSIDERED A WAIVER OF THE UNION'S REPRESENTATIONAL DUTIES.

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the D.C. Circuit in *Toledo Typographical Union No. 63 v. NLRB*, 907 F.2d 1220 (D.C. Cir. 1990), found an employer's negotiation to impasse on a clause allowing direct dealing with employees on retirement issues inappropriate. Thus, if *Toledo Blade* had merely bargained to impose retirement packages "unilaterally, they would not entail its negotiating with its employees. In contrast, the clause at issue here contemplates direct negotiation between employer and employee...to the exclusion of the Union, in negotiating the terms and conditions of retirement." *Id.* at 1223-24. That power distinguishes this case, for Respondent never sought to obtain it from the union.

The Tenth Circuit properly rejected the Board's refusal to allow Colorado-Ute to implement its merit raise proposal, as "fundamentally at odds" with the law of impasse. Pet. 26a. The Petitioner's attempt to compare the implementation stage as akin to an employer imposing a no-strike clause on a union at impasse is entirely different, Pet. 37a, since the right to strike is an explicit statutory right and one the Congress refused to make conditional by any other labor law principle:

> Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

29 U.S.C. § 163.

But, the employees' right to strike set out in the union's analogy, is also not specifically within the confines of the bargaining duty of an employer and union in section 8(d) as a wage or term of employment. It may, however, be exchanged as the quid pro quo of a grievance-arbitration clause. *Reichold Chemicals, Inc.*, 277 N.L.R.B. 639, 640 (1985), or as a condition of reaching agreement. *Shell Oil Co.*, 77 N.L.R.B. 1306, 1308 (1948). Its *sui generis* suggestion that a unique "right' to approve every aspect of an employer's imposed wage scale exists is also a novel interpretation of the Act.

The Petitioner cites four cases to support its proposition: *Koenig Ironworks*, 276 N.L.R.B. 811, 814 (1985); *State Bank of India*, 273 N.L.R.B. 267 n.5 (1984), *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1189 (D.C. Cir. 1981); and *Oneita Knitting Mills*, 205 N.L.R.B. 500 n. 1 (1973). However, the only case the Board cited for its waiver proposition is *Oneita Knitting Mills*, 205 N.L.R.B. 500 n. 1 (1973). That case is much different from the one at bar, for there, the company awarded merit raises under a prior merit pay policy one month after the union was certified. The merit raises not having been subject to negotiation under §

8(d), became section 8(a)(1) and 8(a)(5) activity; for the employer unilaterally changed the negotiating environment.[9]

All these cases are very much different from the impasse situation reached by Colorado-Ute and the union that attempts to reverse unsuccessful negotiations concluded between the parties and a 180 degree turnaround from *Southern Wipers, Inc.*, 192 N.L.R.B. 816 (1971), where the Board permitted merit raises when no evidence of bad faith bargaining existed. *See also Atlantic Research Corp.*, 144 N.L.R.B. No. 39, 54 L.R.R.M. 1049 (1963) (no ULP where the employer "offered to discuss in advance with the union any contemplated increase and to furnish it with necessary information prior to implementation.").

Even after conveying the merit raise results to the union before their payment, the union insists that Colorado-Ute had "to

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[9]The other cited cases are inapposite. In *Koenig Iron Works*, the Board held that an employer's unilateral grant of wage increases in accord with past practice and in accordance with a prior contract had been abrogated by the Board's certification of a new bargaining representative, and was therefore unlawful. The Board did, however, suggest that the employer and union "did not reach an impasse in negotiations...that would justify the Respondent's unilateral wage increases...." 276 N.L.R.B. at 811. It also noted that the employer implemented the wage increases without speaking to the union. In the case at bar, the union possessed the merit pay list for three bargaining sessions prior to Respondent's payment of the merit increases, e.g., September 27, October 3, and October 4, 1984.

In *State Bank of India*, the union was certified on 23 February 1983, and on 28 April 1983, the employer granted a unilateral wage increase that it alleged had been promised previously to the workers. Because the wage increases were paid without notice or bargaining with the union, the Board determined a violation of § 8(a)(5) was at hand. This situation is again, quite unlike the 23 bargaining sessions Colorado-Ute and the Union had.

Furthermore, in *Blevins*, a complicated decision where the employer correctly delayed its discretionary merit increases until completing bargaining with the union, the Board believed the employer should have paid the amounts during bargaining, contrary to *Katz*. In the case at bar, because impasse was reached between the parties, *Blevins* is distinguishable and Colorado-Ute was empowered to implement its merit wage plan.

negotiate [again] over the increases" and whether a dissatisfied employee could approach the employer. The latter result the union finally achieved through bargaining with Colorado-Ute. Pet. 71a. This is simply a way of demonstrating that the union either obtained the concession through its successful application of economic power, *viz.*, the strike or the power of persuasion. The union's request to the Board to be empowered to question an individual's specific merit raise proves the matter was a bargainable issue and not some statutory union right that the union could not "offer" to trade away.

In *American Nat'l Ins. Co.*, the Board had held that the employer's insistence on a strong management rights clause was not only evidence of bad faith bargaining, but was by itself a violation of the Act. In rejecting the Board's holding, this Court reasoned that, "[i]f the Board is correct, an employer violates the Act by bargaining for a management functions clause touching any condition of employment without regard to the traditions of bargaining in the particular industry or such other evidence of good faith...." *Id.* at 407. The Petitioner's argument harks back to this position rejected by the Court, that an employer might bargain for discretion to impasse, but not the logical consequence "whether the employer may implement that discretion once an impasse is reached." Pet. at 14. In language clearly dispositive of this issue, the Court states:

> Any fears the Board may entertain that use of management functions clauses will lead to evasion of an employer's duty to bargain collectively as to "rates of pay, wages, hours and conditions of employment" do not justify condemning all bargaining for management functions clauses covering any "condition of employment" as *per se* violations of the Act. The duty to bargain collectively is to be enforced by application of the good faith bargaining standards of Section 8(d) to the facts of each case.

Id. at 409.

In short, it is well settled that an employer may bargain to impasse on mandatory subjects of bargaining. It is equally well settled that the proper standard by which an employer is to be judged, is the good faith standard embodied in section 8(d) of the Act, which the Board has in fact ruled occurred between Colorado-Ute and the union. The union met and conferred with Respondent on wages, but was unable to achieve its bargaining objective to embed "fixed standards," *American Nat'l Ins.* at 408, by economic means and persuasion. Having failed at the contract table, the union improperly attempts to force a different bargain from Respondent that Respondent never offered to it.

Under well-established rules of collective bargaining, a union need not accede to a management proposal and may always engage in adverse economic activities to attempt to persuade management otherwise. *See Machinists v. Wisconsin Employment Relations Comm.*, 427 U.S. 132 (1972) (neither the union or the Board is "afforded flexibility in picking and choosing which economic devices of labor and management shall be branded as unlawful."). However, that ability to persuade the employer by strikes and other means does not equate with a right to prohibit management from implementing proposed contract terms upon a well founded impasse in collective bargaining. Neither does the Petitioner explain what overriding interest of collective bargaining will be vindicated by resolution in its favor or where the Board's jurisdiction to interfere in the process, if allowed, will end. Since none of these considerations are present, important labor law interests will remain unaffected by granting the writ.

CONCLUSION

For the reasons set out above, the Court should deny Petitioner's request for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

Gerard C. Smetana
RICHMAN, LAWERNCE, MANN
GREENE & SMETANA
333 West Wacker Drive
Chicago, IL 60606
(312) 855-0300

James H. Delman
Colorado-Ute Elec. Ass'n
1845 South Townsend St.
Montrose, CO 81401
(303) 249-4501

Michael E. Avakian
(Counsel of Record)
CENTER ON NATIONAL
LABOR POLICY, INC.
5211 Port Royal Rd., Ste. 103
North Springfield, VA 22151
(703) 321-9180

Attorneys for Respondent

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